Supreme Court, U.S.
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No. 97-16

In The

Supreme Court of the United States

October Term, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS SIERRA CLUB AND CITIZENS COUNSEL ON CONSERVATION AND ENVIRONMENTAL CONTROL

FREDERICK M. GITTES
Counsel of Record
SPATER, GITTES, SCHULTE & KOLMAN
Attorneys for Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

71926 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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QUESTIONS PRESENTED

The following questions correspond more accurately than those in the petition to the statutory and regulatory framework of this case and the issues raised by the record and decision below.

1. Does a court challenge by frequent forest users (who have exhausted internal administrative appeals allowed by agency regulations) to the final decision of the Forest Service adopting a plan for the Wayne National Forest which controls all activity in the Forest, sets timbering goals, and makes binding determinations of the suitability of lands for timbering present a justiciable question when ongoing projects implemented under the Plan adversely affect those challenging the Plan?

2. Did the Sixth Circuit Court of Appeals err in finding that it is arbitrary and capricious for the Forest Service to adopt a final plan for the Wayne National Forest which favors timbering over recreational and other uses of the Forest when the record reveals that the Forest Service: (A) knowingly undervalued the demand for non-motorized recreational activities inconsistent with timbering, despite the warnings of the Service's own panel of experts; (B) disregarded conditions extant on private and State lands interspersed with and surrounding the Wayne; and (C) failed to consider a reasonable range of alternatives as required by the National Environmental Protection Act and Forest Service regulations.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions included in Appendix H to the petition, the pertinent regulations are reprinted in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

This case involves a challenge to the Forest Plan for the Wayne National Forest (hereinafter "Forest" or "Wayne"). The Wayne Plan was required by the National Forest Management Act (hereinafter "NFMA"), which was enacted in 1976. NFMA significantly changed the standards governing the National Forests without repealing pre-existing laws, such as the Multiple Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531 and the Forest Service Organic Act, 16 U.S.C. § 475.

The NFMA, and regulations adopted thereunder, contain numerous substantive and procedural requirements for the development of forest plans. Further, The NFMA expressly directs that forest plans are to control all activities in a forest:

> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the Land Management Plans.

16 U.S.C. § 1604(I).

The Forest Service's regulations also reflect the controlling nature of the forest plan:

> Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource

> management practices, levels of resource production and management, and the availability and suitability of lands for resource management.

36 C.F.R. Chapter 2, § 219.1(b).

This case, brought under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), challenges the Forest Service's failure to comply with its obligations under the NFMA and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332.

A. The Forest Planning Process.

The NFMA directs the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604. Although some policies and procedures are established nationally or regionally, the forest is the base unit for making resource allocation and management decisions. Plans must be developed by an interdisciplinary team integrating relevant sciences and disciplines into the planning process. 16 U.S.C. § 1604(b); 36 C.F.R. § 219.5. After reconciling competing demands for forest uses, each forest plan establishes the rules for managing the forest for up to 15 years. 16 U.S.C. § 1604(b).[1]

Because Congress recognized that forest plans could have significant effects on the environment, the NFMA requires that forest plans must also be developed in accordance with the procedural requirements of the NEPA, 16 U.S.C. § 1604(g)(1); 36 C.F.R. § 219.10(b). A programmatic environmental impact statement must be prepared for each forest plan to ensure that its

1. Other statutory obligations are also integrated into the development of forest plans. Thus, forest plans must provide for multiple use and sustained yield of products and services in accordance with the MUSYA which requires forests to coordinate outdoor recreation, range, timber, watershed, wildlife, and fish uses. 16 U.S.C. § 1604(e).

cumulative impacts are fully assessed before the plan is put into place. The NFMA regulations spell out alternatives that must be analyzed in the environmental impact statement to provide the most complete information about the environmental and resource consequences of competing resources and environmental uses. *See, e.g.*, 36 C.F.R. § 219.12(f).

The Forest Service analyzes the environmental effects of particular site-specific actions at a later stage, but that analysis refers back to the forest plan and Environmental Impact Statement for decisions made and assessed previously. This is in keeping with the NEPA "tiering" regulations, which instruct agencies "to focus on the actual decisions ripe for decision at each level of environmental review" and to "exclude from consideration issues already decided." 40 C.F.R. §§ 1502.20, 1508.28.

B. On-the-ground Decisions Made In Forest Plans.

Forest plans are not merely hortatory documents containing statements of future intent. Rather, they make critical, binding decisions that have on-the-ground effects.

At the outset, a forest plan divides the forest into various land classifications that will be managed to protect or promote different uses of forest resources. Some classifications immediately impose an environmentally protective regime. For example, forest plans recommend for or against designation of undeveloped areas as wilderness under the Wilderness Act, 16 U.S.C. §§ 1133-1136, as wild and scenic rivers under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, and as national trails closed to motorized traffic under the National Trails System Act, 16 U.S.C. §§ 1241-1249. Areas may also be designated as research natural areas because they have special or unique characteristics of scientific interest. 36 C.F.R. § 219.25. Upon any of these designations, the lands are deemed unsuitable for timber production, *id.* § 219.14(a)(4), (c)(1), and are managed to protect the characteristics that led to the recommended protective treatment, generally

foreclosing commercial exploitation of the resources. *See* Wild and Scenic Rivers Act, 16 U.S.C. § 1283(a); *California v. Block*, 690 F.2d 753, 758, 760, 762 (9th Cir. 1982) (the wilderness character of undeveloped areas may not be changed until the Forest Service recommends against a wilderness designation).

Critical habitat for endangered and threatened species is identified in the plan and set aside for special management to ensure the viability of such species. 36 C.F.R. § 219.19(a)(7). Because forest plans may affect the viability of endangered and threatened species, the Forest Service routinely consults with wildlife agencies pursuant to the Endangered Species Act, 16 U.S.C § 1536, to ensure that the plans will not jeopardize the continued existence of such species or destroy their habitat. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane County Audubon Society v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992). Other areas must be managed specially to ensure the viability of other wildlife species. 36 C.F.R. § 219.19. In defining the amount of habitat that will receive special protection, and the protection that will be afforded, a forest plan dictates the extent to which various species will thrive, persist, or falter.

Forest plans also decide whether off-road vehicles will be permitted on each road in the forest. 36 C.F.R § 219.21(g). Even where off-road vehicles are permitted, the plan imposes restrictions on such activities to minimize damage to soil, vegetation, waters, and wildlife habitat and to ensure public safety. *Id.*

After designating some areas as subject to environmentally protective regimes, and thus off-limits to certain resource production activities, forest plans also determine which remaining lands are suitable for resource production activities, such as grazing, logging, and oil and gas leasing. 16 U.S.C. §§ 1604(g)(2)(A), (k). With respect to grazing, the plan determines whether lands will be available for grazing or withdrawn for restoration or other purposes, such as providing habitat to sustain particular species. 36 C.F.R. § 219.20. With respect to logging, the forest plan determines

whether lands are physically or economically unsuitable for logging because available technology will irreversibly damage soil, slope, or other watershed conditions, 16 U.S.C. § 1604(g)(3)(E)(I), or will cause serious damage to water conditions or fish habitat. *Id.* § 1604(g)(3)(E)(iii); 36 C.F.R. § 219.14(a)(2). Lands may be deemed tentatively unsuitable where logging would be incompatible with other management objectives, such as maintaining diversity of plant and animal communities, preserving tree diversity in the region, or protecting water quality or wildlife habitat. 36 C.F.R. § 219.14(c); *see also* 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. §§ 219.26, 219.27(g) (diversity requirements). No logging may occur on such lands for a period of ten years. 16 U.S.C. § 1604(k); 36 C.F.R. §§ 219.14(d), 219.27(c)(1).

Based on the land base remaining after excluding unsuitable lands and those withdrawn to protect particular environments or wildlife, the forest plan establishes an annual logging level that will achieve a perpetual sustained yield. 16 U.S.C. § 1611. This level, known as the allowable sale quantity ("ASQ"), may not be exceeded over the period covered by the plan, except for salvage sales. *Id.* Based on this level, forest plans establish a timber sale schedule to ensure a sustained yield, often specifying the location, acreage, volume, road-building requirements, and logging methods for the sales. 36 C.F.R. § 219.16.

After dividing the forest into management areas, the forest plan prescribes management regimes for each area. Thus, wilderness areas, endangered species habitat, and wetlands are managed differently than lands designated for grazing or logging. *Id.* §§ 219.18, 219.23(f).

The plans also regulate the manner in which resource protectional activities will be conducted. Permissible timber management and logging methods are specified in the plan. 16 U.S.C. § 1604(g)(3)(D), (F); 36 C.F.R. § 219.27(d). *Also see* 36 C.F.R. § 219.27(e).

C. The Mandatory Role Of Forest Plans In Forest Decision-making.

As noted earlier, all site-specific activities in the forest must comply with the forest plan and all resource plans, permits, contracts, and other instruments related to the use of the forest must be consistent with the plan. 16 U.S.C. § 1604(I); 36 C.F.R. § 219.10(e). Decisions made in the forest plan are not revisited when the Forest Service makes subsequent project-level decisions. Instead, the core decision at the site-specific stage is whether the particular action is consistent with the forest plan.

In refusing to consider a wilderness alternative for one site in the Idaho Panhandle National Forest, the Forest Service explained its bifurcated decision-making process:

> The administrative procedures for evaluating possible Wilderness recommendations are separate from the procedures employed to consider specific land management activities. As defined by 36 CFR Part 219, possible wilderness recommendations are evaluated during the forest planning process. According to these regulations, the Forest Service determines the general, programmatic management direction for each National Forest during the initial development and subsequent revision of Forest Plans. . . . It is during this programmatic step in the Forest Service's decision-making process that the agency determines which lands to recommend to Congress for inclusion in the National Wilderness Preservation System.

Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 n.17 (9th Cir. 1992) (quoting Forest Service documents). Another Forest Service document emphasized that decisions made at the

forest planning level are excluded from project-level decision-making and cannot be appealed at that stage:

> During the development of the Idaho National Forest Plan the decision was made to manage specific areas as roadless and undeveloped. The former Skitwish Ridge Roadless Area #01135, which is approximately 6300 acres in size, was not one of these areas, and I am not revisiting the land allocation decisions made in the Forest Plan.

Id.

In sum, forest plans establish the rules for managing the forest. Once those parameters are set, they control forest management decisions for the ten- to fifteen-year duration of the plan.

In light of the controlling nature of a forest plan, it is not surprising that the NFMA also established a comprehensive system of public involvement in the development of forest plans to ensure that the decisions in the plan are thoroughly aired and considered before they are finally made. 16 U.S.C. § 1604(d). *See also* 36 C.F.R. § 219.6. In fact, in recognition of the impact of the forest plan on all operations and activities in a forest, the NFMA also required that there be an independent public review as to any amendment or revision of the plan. 16 U.S.C. § 1604(f). Independent of the regulatory provisions for public participation in the planning process, there are separate administrative procedures which have been established to permit the appeal of decisions to approve a forest plan. 36 C.F.R. § 217.1

D. The Wayne Plan.

The deciduous hardwood forest of the Wayne includes a great

portion of Ohio's last remaining older forest and provides a broad diversity of plant and animal species, including many species considered by the State of Ohio to be threatened or endangered. JA at 520. [2] Only 4% of Ohio's publicly-held lands are available for recreation, and the Wayne comprises much of it. The Wayne also constitutes 24% of Ohio's publicly-owned land with wildlife value. JA at 968. The Forest boundaries encompass three different forest units, which included, as of 1985, 822,953 acres. The National Forest System is authorized to acquire land within the purchase boundaries of the Forest. As of 1985, when the Plan was issued, the Forest owned 177,761 acres or 21% of the land area within the boundaries. JA at 572.

The planning process for the Wayne began in 1981 and continued for a period of five years. The proposed plan and Draft Environmental Impact Statement (DEIS) were published in 1986. The Forest Service adopted the Final Plan on January 4, 1988, accompanied by a Record of Decision (ROD) and Final Environmental Impact Statement ("FEIS"). JA at 48. The Plan has been in effect since that date. The Forest Service has announced that in 1999 it will develop a new plan for the Wayne since the current plan is due to expire and is premised on out-dated information.

The Plan designated 126,107 acres of the Forest to be included in the timber base, the portion of the Forest from which timber could be removed or cut. This meant 75% of the total net Forest area was designated as suitable timber base. JA at 68. According to the planners, 75% of the net Forest would be cut over the planning horizon of 50 years. During the 10-year life of the Plan, 7.5 million board feet of timber could be cut per year. By the fifth decade, planners determined that over 16 million board feet would be cut each year, an increase of over 100%. R.14, Plan Table 4-1. The Plan designated even-aged management techniques as the primary

2. References, where possible, are to the Joint Appendix (JA) in the Court below. Otherwise, citations are to the record (R) and particular document in the record.

method of timber management (80% of all timbering).[3] JA at 815 and 970 and FEIS at 1-9. *See also* R.14, Plan, App. A, Table Only.

Pursuant to the regulations, the Plan included an implementation schedule. "The implementation schedule is a formulation of site-specific projects and activities which will carry out the Forest Plan directions." JA at 982. "The schedule will include all proposed projects including names, locations, and dates of execution." R.14 Plan at 5-2. While the complete implementation schedule is maintained at the Forest office, the Plan Appendix included a table of planned timber sales for the first three years of the Plan. JA at 984-988.

Aside from designating the suitable timber base, proposed timber management techniques and allowable sales quantities, the Wayne Plan divided the Forest into management areas with prescriptions and directions controlling all activity and management action in the area. R.14, Plan 4-63-4-181. In connection with designating the various management areas, the Plan made numerous other determinations for the Forest. For example, the Plan determined the total forest area to be available for semi-primitive, non-motorized recreation opportunities and, as a result, the level of demand for such conditions the Forest could meet. R.14, Plan at 3-3 and Table 4-1. Similarly, the Plan prescribed the total number of temporary and permanent roads to be built as well as roads to be closed. The Plan determined the total area and location of forest land on which off-road vehicle use would be permitted. R. 14, Plan at 3-6.

The Wayne Plan designated 5,530 acres for study as Candidate Special Areas and Research Natural Areas (called management area

3. Even-aged management involves the application of a combination of actions that result in the creation of stands in which trees of essentially the same age grow together. This is typically accomplished by removing the trees in a designated area all at once or in successive stages close in time. Even-aged management includes three techniques; clearcutting, shelterwood cutting and seed tree cutting. Controlled burns are used to the same effect.

9.2), which resulted in limitations on the uses of those portions of the Forest. The Plan also indicated the number of developed recreation sites and miles of trails to be constructed in management areas. R.14, Plan Table 4-19. The Plan also provided detailed, mandatory guidelines as to operational standards for management practices. For example, the Plan defined the size of buffer zones between logging activities and streams and other watershed. The Plan also established monitoring and evaluation programs for the Wayne based on the 17 management indicator species designated in the Plan. JA at 1000.

The Wayne Plan also made it clear that Plan decisions and determinations would not be revisited as to specific projects. Because of the "tiering" of decision-making adopted as part of the Plan, the scope of future decision-making and environmental analyses "will be narrowed." *See, e.g.*, R. 14, Plan at 5-20.

E. The Proceedings Below.

While this case was pending in the Court of Appeals, two timber sales were undertaken in the Wayne, the Bluegrass and the Markin Fork projects.

Logging (and burns) for the Bluegrass project has been 50% completed. Subsequently, the Court of Appeals issued its decision and remanded this case to the District Court. Prior to the remand, the issue of individual standing had never been contested in the District Court, and the record was devoid of any evidence concerning the particular uses of the Wayne made by the members of the plaintiff organizations. Similarly, there had been no evidence adduced concerning the particular, individual injuries claimed by the plaintiffs.

On August 26, 1997, in light of the remand, the respondents filed with the District Court a renewed motion for summary judgment, including three affidavits of members of the respondent organizations, detailing their frequent use of the Forest, the purposes

of their Forest visits and the impact of the Plan and the recently-initiated timber projects on their activities. The three affidavits presented before the District Court included the declarations of David A. Scott, Stephen Ostrander, and Jason Tockman.

Mr. Ostrander is a Sierra Club member and journalist who is authoring a revised, expanded version of a previously-published guide to nature preserves in Ohio and Pennsylvania. Mr. Ostrander also lives a short distance from the Wayne. For personal recreation and to support his work as an author, he hikes throughout the Wayne, including the areas included in the timber base and the areas currently being timbered under the Plan.

David A. Scott, a Board member of the Ohio Sierra Club, heads the organization's Outings Committee, which has led hikes in many areas of the Wayne. Mr. Scott, who anticipates leading future hikes in the Wayne, makes it clear in his declaration that the hikes in the Wayne led by the Sierra Club in the past and those contemplated for the future traverse areas of the Forest presently included in the timber base.

Mr. Tockman, a member of the Citizens Council, lives close to the Forest and does research on the Wayne for his master's degree in environmental studies at Ohio University. Mr. Tockman is employed by the Buckeye Forest Council to hike throughout state and national forest areas, including the Wayne. Mr. Tockman's declaration makes it clear that he routinely hikes the Wayne for purposes of research, personal recreation, and his employment. He hikes the areas presently opened to timbering under the Plan, including the areas encompassed by the two timber projects encompassed in the Bluegrass and Markin Fork timbering projects.

SUMMARY OF ARGUMENT

This case does not present the conflict as to justiciability petitioner suggests. Developments which have occurred after submission of the case to the Court of Appeals (highlighted by

recent filings in the District Court) demonstrate that this is a justiciable controversy even accepting the petitioner's views of standing and ripeness. Besides the fact that this case does not present the question, there are two reasons the Court may not need to address the justiciability of forest plans at this time. First, this Court's decision in *Bennett v. Spear*, 117 S. Ct. 1154 (1997) provides guidance not previously available which may resolve any conflicts. In addition, the Forest Service recently announced its decision to review and revise its regulations governing the forest planning process and forest plans. The future content of the regulations is likely to be more specific as to the role of forest plans indicating and authorizing ground disturbing projects.

The petitioner's arguments regarding the merits rest on a total disregard for the factual bases of the decision of the Court of Appeals. By focusing almost exclusively on *dicta* in the Court of Appeals' decision, petitioner attempts to create the false impression that the decision below rests on criticism of Congressional legislation affecting the operations of the Service, as well as the Court's conclusion that a particular method of timbering — clearcutting — was permissible only in exceptional circumstances. In fact, the Court of Appeals' finding that the Wayne Plan was arbitrary and capricious rested on evidence in the record regarding the conduct of the Forest Service in development of the plan and its conclusions were independent of the propriety of the use of clearcutting in the Wayne.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT THE STANDING AND RIPENESS QUESTIONS SUGGESTED BY PETITIONER.

A. Justiciability Is Not A Question As To The Wayne Plan.

The petitioner contends this case presents the Court with an opportunity to resolve disagreement between the Eighth and Eleventh Circuit Courts of Appeals, and the Sixth, Seventh, and Ninth Circuit Courts of Appeals as to the justiciability of challenges to forest plans before site-specific actions have begun under the plans. However, there is *no* disagreement among the Courts of Appeals as to the justiciability of such plans once site-specific action is taken. In suggesting that this case presents a conflict, petitioner omitted from its Petition crucial developments which began after the case had been submitted to the Court of Appeals.

The Eighth and Eleventh Circuits premised their conclusion that challenges to forest plans are not justiciable because of their view that the adoption of the Forest Plan "does not dictate the occurrence of, nor serve as the final authorization for, any ground-disturbing project (and its environmental impacts and injuries)." Pet. at 3-4. As is apparent from the discussion contained in the Statement of the Case above, this is an extremely myopic and distorted understanding of the actual contents and effects of forest plans. Nevertheless, even these courts have made it clear that once ground-level projects are begun pursuant to a forest plan, there is no question that challenges to a forest plan by individuals or groups affected by the ongoing projects are justiciable. As the Eleventh Circuit emphasized:

> We are persuaded by appellees' contention that no site-specific action will be taken pursuant to the Plan without a second stage of decision-making; 'subsequent

> discretionary actions require separate and independent decision-making' before any site-specific action will occur. Appellees concede that appellants can challenge both the site-specific action as well as the Plan-level decisions underlying the specific action of the second stage. Our opinion is dependent on that concession. . . .
>
> * * *
>
> As the district court stated, '[This] court's determination that plaintiffs lack standing at this time to assert their claims made herein is *ipso facto* a determination that ... such time as the Plan is implemented in a specific way, it will not be too late to complain.'

Wilderness Society v. Alcock, 83 F.3d 386, 390, 390 n.8 (11th Cir. 1996) (citations and footnotes omitted).

As described in the Statement of the Case above, that is now the situation presently confronting the District Court on remand. The respondents who originally challenged the Plan to prevent its implementation, including the portion of the Plan governing timbering, have now submitted affidavits addressing standing issues which confirm that two timber sale projects have proceeded under the Plan. These affidavits also indicate that these projects (one of which is 50% completed) are in areas used by the respondents. In addition, the affidavits confirm that the decision to proceed with these projects relied on the earlier controlling decision of the Plan to include the project areas in the suitable timber base. As a result, this case does not present the question suggested by Petitioner.

B. Ripeness And Forest Plans.

While this case, factually, no longer presents the conflict suggested by petitioner, it does highlight one of the reasons the court below and other circuits have found forest plan challenges justiciable at the time of the adoption of a forest plan. The reality is that forest plans do contain numerous decisions that will, with certainty, affect forest users both before and after "ground-disturbing" activities are initiated under the plan.

It has been the real world consequences of forest plans, and the need to ensure compliance with procedural requirements in the NFMA and NEPA, which led several courts of appeals to conclude that challenges to forest plans are generally justiciable. In *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), the court addressed the decision of the Forest Service to recommend against Wilderness designation for 43 of 47 roadless areas in the Idaho Panhandle National Forest. As here, the decision was challenged on several grounds, including procedural violations of NEPA. The Ninth Circuit concluded:

> Viewed in this light, and whether or not it is irrevocable, the Service's decision is harmful for standing purposes. The ICL's complaint is that the faulty EIS has made possible development that wilderness designation would have prevented. Pursuant to NEPA and the NFMA, these are injuries that we must deem *immediate*, not speculative. Indeed, short of assuming that Congress imposed useless procedural safeguards, and that wilderness designation is a superfluous step, we must conclude that the management plan plays some, if not a critical, part in subsequent decisions.
>
> More importantly perhaps, if the agency

> action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Idaho Conservation League v. Mumma, *supra*, at 1516 (emphasis in original).

The Seventh Circuit's conclusion in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) echoed similar concerns:

> . . . [A]s the district court points out, the regulations regarding forest management plans speak in mandatory terms. * * * The plans clearly require certain projects to be undertaken and indicate what their effects may be. * * * That the Service has yet to actively *inflict* the injury through the development of site-specific projects does not render the injury 'conjectural' or 'speculative' and therefore does not deprive plaintiffs of standing to challenge the plan.' * * * As the Supreme Court noted in the very sentence before it created the 'certainly impending' language on which the defendants rely, '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'

Sierra Club v. Marita, *supra*, at 611-612 (citations omitted, emphasis in original).

The Seventh Circuit in *Marita* also relied on *Lujan v. Defenders of Wildlife*, in which this Court stated:

> There is much truth to the assertion that 'procedural rights' are special: the person who has been accorded a procedural right to protect his concrete interest can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally-licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2114, 2143 n.7 (1992).

The Plan in this case involved challenges to both procedural and substantive decisions that had immediate impact upon the Plan's adoption. For example, in this case, 75% of the net Forest area was deemed suitable for timbering upon adoption of the Plan. With that decision these Forest areas lost protection and were opened to logging. Subsequent timber projects proceeded without revisiting the question of suitability for inclusion in the timber base because the matter had already been determined in the Plan. Nor was there ever a question of the Forest Service's intention to proceed with the Plan. Forest Service regulations require a schedule for implementing the Plan, and the Wayne Plan, like most, contained a chapter on implementation including implementation schedules.

The challenge to the Wayne Plan also involved non-compliance with requirements of NEPA. The heart of any environmental impact

statement under NEPA is the alternatives which are considered. *See* 40 C.F.R. § 1502.14. Alternatives presented in connection with the Wayne Plan failed to provide a reasonable or broad range of alternatives as required. Alternatives are intended to sharply define the issues and trade-offs, and provide a clear basis for choice. This should reflect all feasible and realistic approaches to resolving key issues. The alternatives actually presented consisted of very similar proposals on the key planning issues.

Certain issues were identified by Wayne planners at the outset of the planning process to be of great concern. Among these issues were the extent of the Forest to be designated as suitable for timbering, and closely related, the rotational period for timbering that would be permitted (controlling how often and when timber is harvested). Another key concern related to the ability of the Forest to meet the demand for semi-primitive recreational opportunities. Examining the alternatives presented, it was apparent that the alternatives did not present the decision-makers or the public with a broad range of choices concerning the amount of Forest land designated as suitable for timbering.

Alternative 7 (which emphasizes a low-intensive management) declares 90% of the Forest as unsuitable for timber production. JA at 673. The next closest alternative (Alternative 5) designates only 20% of the Forest as unsuitable. The effects of alternatives spanning the gap between 90% and 20% are important for the decision-maker and public to understand, yet there was simply no alternative that presented any choice between these extreme variances.

Another example of the lack of meaningful alternatives was the rotational periods in the Plan. Shorter rotational periods mean more frequent disturbances will occur from timber harvests. Rotational periods affect not only the timing of harvests and associated regenerations, but the likelihood that recreational users will be subjected to disturbances or interruptions, as well as activities which diminish the aesthetic values of the Forest. Despite the importance of the issue, 160-year rotations are never applied to

more than 6% of the Forest in any alternative, even though the public expressed the desire for the big trees and low-level disturbances that will result from longer rotations. The Forest Service never explained its reasons for not including greater amounts of 160-year rotations in the alternatives. Yet, both the reasons and greater choices are essential for the decision-maker and the public to fully understand the range of choices to be applied in the Wayne. DEIS Table 2-15.

Similarly, the alternatives failed to offer a meaningful range of choices regarding the area of the Forest to be dedicated to semi-primitive recreational opportunities. The total area providing semi-primitive recreation is never more than 22% of any alternative, even though the Forest Service admitted that semi-primitive conditions are scarce in Southeastern Ohio, JA at 694, and the role of the National Forest lands is to provide benefits that cannot be supplied by private lands. JA at 968. The Forest Service conceded that it could not meet the demand for semi-primitive forest recreational opportunities, and there were numerous comments to the Forest Service expressing concern and desire for enhancement for semi-primitive recreational opportunities in the Forest.[4]

It is important to note that the planners' violations of NEPA and the excessive timber base set by the Plan are unrelated to the method of timbering. In fact, even if even-aged management techniques had not been chosen, the plan's overinclusive timber base and inadequate range of alternatives would call into question any logging project. In light of the facts, the Court of Appeals did not err in deciding to hear this case.

C. The Decision Of The Court In *Bennett v. Spear* Provides New Guidance Unavailable Previously.

This Court, only this year, issued a decision which should

4. In fact, Forest planners acknowledged a state-wide shortage of forest-type recreational opportunities and that only 50% of the demand for such recreational opportunities was being met state-wide. JA at 576.

provide guidance to resolve any actual conflicts among the circuits regarding the justiciability of forest management plans. Those decisions which have concluded that challenges to forest plans are not justiciable before site-specific projects are initiated have focused on the "immediacy" component of this Court's standing and ripeness decisions. In these cases, the crucial issue for the Court appears to be that the forest plan may be, in some circumstances, one or two steps up the chain of causation from the final event that injures the plaintiff.

This Court's recent decision in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), makes clear that this narrow focus on identifying — and insisting that the plaintiff must wait for — the last event in the causal chain in order to establish justiciability is incorrect. In *Bennett*, this Court rejected the government's position that a final biological opinion causes no injury that is traceable; the Court observed that the government's position "wrongfully equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 1164. The Court concluded that its decisions do not exclude from justiciability controversies situations where the injury complained of "is produced by determinative or coercive effect upon the action of someone else." *Id.*

These statements in *Bennett* make clear that a focus on the presence or absence of the last link in a causal chain in order to determine the justiciability of a forest plan challenge overlooks those situations where the injury is occasioned by the coercive or determinative effects of an action several steps up the chain. Because forest plans are legally binding on all subsequent activities in a forest, and because the decision to proceed with these activities is made by the Forest Service, not some independent third party, a coercive or determinative effect exists when the Forest Service adopts a forest plan. The court's decisions do not require plaintiffs to wait until the other shoe falls to pursue such a claim.

In *Bennett*, the Court dealt with a biological opinion which

would have the effect of forcing the Bureau of Reclamation to maintain higher minimum water levels in the Klamath Irrigation Project. The Court in *Bennett* accepted the proposition that the plaintiffs in that case must show that they would receive less water in order to establish injury. However, the Court did not determine that the *Bennett* plaintiffs needed to wait until they were actually deprived of the water before they could bring to court the challenge to the biological opinion that would affect their water supply. Instead, this Court concluded that only evidence of the coercive effect of that biological opinion upon the water supply was necessary, not its implementation.

The Wayne Plan presents a similar situation. The Forest Plan has a determinative effect on all future actions of the Forest Service. In this dispute, the respondents have asserted, *inter alia*, that the suitable land decision in the Wayne Plan was made using an improper analysis. *Any* decision to proceed with a timber sale on lands classified as suitable under this incorrect analysis will injure the respondents because a proper analysis could have eliminated those acres from the suitable land base. Presumably, the Forest Service did not prepare the plan simply to discard it, and some decision to proceed with a timber sale was expected to and did occur. Under these circumstances, the respondents need not await the "very last step in the chain of causation." *Bennett* at 1164.

The combination of NEPA violations and the arbitrary application of NFMA and related regulations reflected in the Plan set in motion and dictated events which injure the respondents' interests in the Wayne.

D. Recent Events Will Alter Fundamentally The Regulatory Framework For This Case.

On August 15, 1997, the Secretary of Agriculture announced the formation of a Committee of Scientists to "provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be made to the

land and resource management planning process." 62 Fed. Reg. 43691 (August 15, 1997). The Committee's charter includes the following directions:

> The Committee of Scientists shall also provide technical advice on the land and resource management planning process and provide materials for the Forest Service to consider for incorporation into the revised planning regulations.

Id. Previously in 1995, the Department of Agriculture proposed extensive revisions to the forest planning regulations adopted to implement the National Forest Management Act. *See* 60 Fed. Reg. 18886, *et seq*. These proposed revised planning regulations and the formation of a Committee of Scientists to recommend further revisions indicate that the NFMA regulations will undergo a major overhaul in the near future.

At the same time, the aspects of the decision in this case raised in the petition are based on *existing* NFMA regulations. For example, it is the existing regulations that lead petitioners to argue (albeit incorrectly) that "[a]doption of a forest plan does not dictate the occurrence of, nor serve as the final authorization for, any ground-disturbing project (and its environmental impacts and injuries.)" Pet. at 3-4 (citing and discussing regulations). Even if petitioner was correct in this view there is nothing in the NFMA itself that would preclude a revision of the regulations to establish an explicit requirement that some or all ground-disturbing activities must be identified and authorized in the forest plan. The controversy in this case over what a forest plan does, and whether a challenge to it when it is first adopted is justiciable, turns on the language of the current NFMA regulations and differing views about what these regulations accomplish.

The pending revision of the NFMA planning regulations will fundamentally alter the issues raised in the petition.

II. THE COURT OF APPEALS DECISION RESTED ON FACTUAL EVIDENCE CONCERNING THE ARBITRARINESS OF THE PLAN WHICH WAS INDEPENDENT OF THE COURT'S DICTA CONCERNING FEDERAL STATUTES GOVERNING FOREST SERVICE OPERATIONS.

The petitioner suggests that the Court of Appeals' "remarkable *holding*" (emphasis added) was that an *"agency's adherence to Acts of Congress constitutes judicially remediable bias."* Pet. at 14. (Emphasis in original). The petitioner ignores the actual holding of the Court below and, instead, asks this Court to review *dicta* in the majority opinion which is critical of several federal laws governing the Forest Service. This criticism was not a holding in the case and, in fact, was unrelated to the factual predicate for the decision. This Court has consistently indicated that it reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 76 S. Ct. 824, 827 (1956); *California v. Rooney*, 483 U.S. 307, 311 (1987).

The decision below rested firmly on record evidence that the Forest Service acted arbitrarily and capriciously in establishing the timbering program in the Plan for the Wayne. This is highlighted by the fact that Judge Batchelder, in her concurring opinion, disassociated herself from the statutory criticisms in the majority opinion while unequivocally joining in the holding of the case:

> * * * I write separately because, while I, too, have serious questions and concerns about the management practices and policies of the Forest Service, I do not believe that the majority's largely undocumented broadside against the Forest Service is appropriate. The issue before us is simply whether the Plan was properly promulgated within the appropriate exercise of the agency's

> discretion and is therefore within the law. We conclude that it is not. Our speculation about the motives and biases of the Forest Service, even if accurate, is unnecessary, and therefore, ought not to be voiced in this opinion.

Pet. App. at 9a.

The majority opinion did not rest on general criticisms of the statutes governing the Forest Service. The opinion was fact bound and premised on the evidence in the record which demonstrated that the Forest Service arbitrarily applied the statutes and regulations governing forest plans. The heart of the decision is contained in the following portion of the opinion of the Court of Appeals:

> The Forest Service argues that its even-aged management plan is based on evidence that timbering will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest. Most recreation does not require timber harvesting, however. Further, as the Forest Service's own records reflect, the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of diverse plant and animal life. Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting. The planners also failed to recognize that cutting is unlikely to stimulate new and valuable forms of recreation because much of the Wayne has already been cut or developed. In

> that particular environment, clearcutting loses its value.

Pet. App. at 5a-6a.

A. The Evidence Ignored By Petitioner.

The observations of the Court below are amply supported in the record and also reflect the fact that the Forest Service was arbitrary and capricious even in applying its own regulations. The agency's regulations require that the Forest Service consider conditions on private and other publicly-owned land in designing a Forest Plan. 36 C.F.R. § 219.21 and 36 C.F.R. § 219.3 There were over 800,000 acres within the boundaries of the Forest purchasing unit as of 1982, when the original DEIS was begun for the Wayne. Only 21% of that area was actually owned by the Forest Service.

The record below was replete with evidence of the Forest Service's failure even to consider conditions on private and state-held lands surrounding and interspersed with the Wayne. The DEIS indicated that the 655,360 acres of privately-held land in the area of the Forest was not a mirror image, ecologically, of the Forest Service holdings. Almost 40% of the acreage on the private holdings is in open conditions such as cropland or pasture, often edging on areas of private or public land containing forest. JA at 573. This contrasts sharply to the Wayne Forest on which only 3% of the acreage was in open condition, while over 96% of the holdings in the Forest are dominated by hardwoods, pine or pine oak. JA at 574.

The recreational opportunities (including certain types of hunting) and wildlife value associated with early successional and edge conditions were abundantly met by private and State holdings. The record below is replete with reports concerning the overabundance of game animals associated with early successional and edge conditions in the region of the Wayne. The Forest Service's

records confirmed that the conditions on private holdings in the area had contributed to the overabundance of game and provided abundant recreational hunting activity. In fact, hunting quotas were raised because of the rapidly accelerated growth of deer and other game animals in the region.

The Wayne Plan proposed extensive timbering in the Wayne Forest for the purpose of promoting recreational hunting opportunities and related early successional forest conditions which were already in abundant supply on the private and State-held lands interspersed with and surrounding the Forest. What is and has been in short supply in the area of the Wayne and throughout Ohio are mature forest growth conditions permitting non-motorized recreational activities, such as hiking and remote camping. Planning documents which were part of the record below demonstrated that the greatest unmet demand in the Wayne was for these types of recreational uses. As noted by the Court of Appeals, most recreation, including fishing, off-road vehicle use, game hunting, camping, hiking, and horseback riding, does not require timber harvesting. Some, particularly fishing, hiking and other forms of dispersed recreation, are harmed by timber cutting.

The Wayne planners overestimated the benefits to recreation from timber because they failed to take price-quantity relationships into account. If the entire Wayne Forest were wilderness, then primitive recreation would have a relatively low value, and cutting one acre might stimulate new and valuable forms of recreation. But the reverse is true: much of the Wayne and surrounding lands had been cut over and developed. Thus, the value of recreation on timbered land is low compared to the value of lands protected from timbering and development.

Wayne planners were warned by their interdisciplinary team of experts that the local value of semi-primitive non-motorized recreation was much greater in the Wayne Forest than the value actually used for purposes of planning by the Forest Planners. JA at 694. The DEIS for the Wayne acknowledged that "people would

be willing to pay more [than the value used by planners] for recreation in SPNM setting because of the limited opportunity to do so in Southeastern Ohio."[5] *Id.* The DEIS and the alternatives were based on completely false premises: that money-losing timber sales can be ignored because of the alleged recreational value of timbering, even though the recreational value of areas not timbered is "much greater" and was undervalued in the planning process.

B. The Appropriateness Of Clearcutting Was Not A Determinative Factor.

Contrary to the suggestions in the petition, this case does not present an opportunity to address any conflict (apparent or real) between the Fifth and Sixth Circuits as to whether the NFMA bars clearcutting in the National Forest absent exceptional circumstances. As is apparent from the opinion below and the discussion above, the Court of Appeals rejected the Plan because of its overemphasis, to the detriment of other Forest uses, on even-age timber management in the Forest.

There are several types of even-aged silvicultural techniques, but the Plan's timbering plans would be just as arbitrary and unlawful if any of the methods were prescribed by the Plan. Even if the timbering had been done by the shelterwood technique, for example, instead of clearcutting, the suitable timber base still would have been excessive and the timbering would still reflect a total disregard for the conditions extant on the private and state-owned lands surrounding and interspersed with the Wayne. Similarly, regardless of the method of timbering, the range of alternatives was still inadequate as to the key planning issues, and the Forest Service still knowingly undervalued the demand for semi-primitive, non-motorized recreation.

---

5. The petitioner suggests that because the Plan includes acreage assigned to primitive recreation, there was no "bias". Pet. at 17 n. 8. But the issue before the Court was the arbitrariness of failing even to consider conditions extant on surrounding lands in determining *how much timbering* should be undertaken. (Cont'd)

The court below did express the view that the Forest Service had also violated the NFMA by the excessive use of clearcutting in the Plan. Under the Plan, 80% of all timbering was to be by clearcutting. The Court concluded:

> The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness, the Forest Service created a very distorted picture of the Wayne National Forest. Based on false premises such as these, the Forest Service improperly concluded that clearcutting was necessary.

The NFMA does, in fact, contain specific requirements limiting the use of clearcutting in the National Forests which do not apply to any other silvicultural technique or timber management method.

(Cont'd)
Further, consideration of private and state-owned land would have resulted in designating more alternatives with emphasis on semi-primitive, non-motorized recreation. Similarly, petitioner contends that knowingly undervaluing semi-primitive, non-motorized recreation was "harmless error." *Id.* But petitioner is silent, as is the Plan, as to why the Forest Service ignored their own experts. The undervaluation obviously affects all the alternatives and caused the Forest Service to make decisions based on false assumptions.

Title 16, § 1604(g)(3)(F) requires that the Forest Service:

> Insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where —
>
> (I) For clearcutting, it is determined to be the optimum method, and for other such cuts, it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

Because of the language in NFMA and its legislative history, the petitioner's claimed conflict between the Fifth and Sixth Circuits — notably, the only two Courts of Appeals to have even discussed the issue — is more apparent than real.

As the Fifth Circuit noted in *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 200, 210 (5th Cir. 1978), a case relied upon below, the Congressional Committee responsible for NFMA "clearly recognized the significant impact of clearcutting in National Forests." The Court, quoting the Committee's report, noted:

> Clearcutting and other harvest systems aimed at creating even-aged stands result in sudden ecological change. The impacts on esthetics and other forest values are perceived as being more immediately significant than those with uneven-aged management. Therefore, the Committee believes that special consideration is needed to insure proper use of these systems.

Id. at 209.

Indeed, the Fifth Circuit in *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994), like the Sixth Circuit, recognized that Congress had imposed limits on the use of clearcutting when it commented:

> Thus, NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management. *To be sure, these restrictions reflect a Congressional wariness toward even-aged management, constraining resort to its use.* This sluicing effect of the required inquiries might be described as making a decision to employ even-aged management more difficult.

Id. at 800 (emphasis added).

This case did not turn on the use of clearcutting as opposed to other timber management techniques. Nor is there a clear, developed conflict among the circuits concerning the exact limits on clearcutting under the NFMA. Only two Courts of Appeals have ever commented on the matter, and both have recognized that Congress disfavors clearcutting and that NFMA contains constraints on its use. This case simply determined that the Forest Service arbitrarily applied NFMA as to the Plan's proposals for even-aged management. The propriety of clearcutting was not determinative of the ruling of the court below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FREDERICK M. GITTES
Counsel of Record
SPATER, GITTES, SCHULTE & KOLMAN
Attorneys for Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

APPENDIX A — 36 CODE OF FEDERAL REGULATIONS, CHAPTER II

PART 217 — APPEAL OF REGIONAL GUIDES AND NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLANS

* * *

§ 217.1 Purpose and scope.

(a) This part provides a process by which a person or organization interested in the management of the National Forest System may administratively appeal decisions to approve, amend, or revise a National Forest land and resource management plan or approve or amend a regional guide prepared pursuant to 36 CFR part 219. This part establishes who may appeal such decisions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply. This part provides a review of such decisions by an official at the next administrative level.

(b) This part complements, but does not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA) and the associated implementing regulations and procedures in 40 CFR parts 1500-1508, 36 CFR parts 215, 216, and 219. Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15.

* * *

§ 217.3 Decisions subject to appeal.

(a) The following decisions are subject to appeal under this part:

(1) Decisions to approve, amend, or revise a National Forest Land and Resource Management Plan including project or activity decisions for which environmental effects have been analyzed and disclosed within a final EIS and documented in a Record of Decision including approval, significant amendments, or revisions of a land and resource management plan.

* * *

§ 217.6 Participants.

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level.

* * *

§ 217.7 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office

that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review as follows:

(1) If the initial Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(d) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

* * *

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days in appeal of non-significant amendments to land and resource management plans or within 60 days for appeals of land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions. The time period for forwarding the decision documentation is not extendable.

(b) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The Deciding Officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any appeal related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.13 of this part.

(d) It is the responsibility of the Reviewing Officer to

maintain in one location a file of documents related to the decision and appeal.

(e) *Closing the record.* (1) In appeals with intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor, but not later than the end of the 30-day period provided for intervenors to submit comments (§ 217.14(c)).

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the Deciding Officer, unless time has been extended as provided for in §§ 217.12 and 217.13.

(f) The appeal record is open to public inspection at any time during the review.

(g) In appeals involving initial decisions of the Chief (217.7(a)), the establishment of an administrative record as defined in paragraph (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

* * *

§ 217.16 Decision.

(a) The Reviewing Officer shall not issue a decision prior to the record closing (§ 217.15(e)).

(b) The Reviewing Officer's decision shall, in whole or in part, affirm or reverse the original decision. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The Reviewing Officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a Receiving Officer's decision as provided at § 217.7(d), the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and the decision is not subject to further review under this part.

* * *

PART 219 — PLANNING

* * *

Subpart A — National Forest System Land and Resource Management Planning

* * *

§ 219.1 Purpose and principles.

(a) The regulations in this subpart set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (hereafter, *RPA*). These regulations prescribe how land and resource management planning is to be conducted on National Forest System lands. The resulting plans shall provide for multiple use and sustained yield of goods and

services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner.

(b) Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management. Regional and forest planning will be based on the following principles:

* * *

§ 219.6 Public participation.

(a) Because the land and resource management planning process determines how the lands of the National Forest System are to be managed, the public is encouraged to participate throughout the planning process. The intent of public participation is to —

(1) Broaden the information base upon which land and resource management planning decisions are made;

(2) Ensure that the Forest Service understands the needs, concerns, and values of the public;

(3) Inform the public of Forest Service land and resource planning activities; and

(4) Provide the public with an understanding of Forest Service programs and proposed actions.

(b) Public participation in the preparation of environmental impact statements for planning begins with the publication of a notice of intent in the Federal Register. Public involvement in the preparation of draft and final environmental impact statements shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations and Forest Service Manual and Handbook guidance (hereafter, "NEPA procedures"). Public comments shall be analyzed according to NEPA procedures.

(c) Public participation activities, as deemed appropriate by the responsible line officer, shall be used early and often throughout the development of plans. Formal public participation activities will begin with a notice to the news media and other sources which includes, as appropriate, the following information:

(1) A description of the proposed planning action;

(2) A description and map of the geographic area affected;

(3) The issues expected to be discussed;

(4) The kind, extent, and method(s) of public participation to be used;

(5) The times, dates, and locations scheduled or anticipated, for public meetings;

(6) The name, title, address, and telephone number of the Forest Service official who may be contacted for further information; and

(7) The location and availability of documents relevant to planning process.

(d) Public participation activities should be appropriate to the area and people involved. Means of notification should be appropriate to the level of planning. Public participation activities may include, but are not limited to, requests for written comments, meetings, conferences, seminars, workshops, tours, and similar events designed to foster public review and comment. The Forest Service shall state the objectives of each participation activity to assure that the public understands what type of information is needed and how this information relates to the planning process.

(e) Public comments shall be considered individually and by type of group and organization to determine common areas of concern and geographic distribution. The result of this analysis should be evaluated to determine the variety and intensity of viewpoints about ongoing and proposed planning and management standards and guidelines.

(f) All scheduled public participation activities shall be documented by a summary of the principal issues discussed, comments made, and a register of participants.

(g) At least 30 days' public notice shall be given for public participation activities associated with the development of regional guides and forest plans. Any notice requesting written comments on regional planning shall allow at least 60 calendar days for response. A similar request on forest planning shall allow at least 30 calendar days for response. Draft regional guides and forest plans and environmental impact statements shall be available for public comment for a least 3 months. See also §§ 219.8(c) and 219.10(b).

(h) The responsible line officer shall attend, or provide for adequate representation at, public participation activities.

(i) Copies of approved guides and plans shall be available for public review as follows:

(1) The RPA Assessment and the RPA Program shall be available at national headquarters, The Northeastern Area State and Private Forestry Office, and all Regional offices, Research Stations, Forest Supervisors' offices, and District Rangers' offices;

(2) The regional guides shall be available at national headquarters, the issuing regional office and regional offices of contiguous regions, each Forest Supervisor's office of forests within and contiguous to the issuing region, and each District Ranger's office in the region;

(3) The forest plan shall be available at the regional office for the forest, the Forest Supervisor's office, Forest Supervisors' offices contiguous to the forest, District Rangers' offices within the forest, and at least one additional location, to be determined by the Forest Supervisor, which shall offer convenient access to the public.

These documents may be made available at other locations convenient to the public.

(j) Documents considered in the development of plans shall be available at the office where the plans were developed.

(k) Forest planning activities should be coordinated to the extent practicable with owners of lands that are intermingled

with, or dependent for access upon, National Forest System lands. The results of this coordination shall be included in the environmental impact statement for the plan as part of the review required in § 219.7(c). The responsible line officer may individually notify these owners of forest planning activities where it is determined that notice provided for the general public is not likely to reach the affected landowners.

(l) Fees for reproducing requested documents shall be charged according to the Secretary of Agriculture's Fee Schedule (7 CFR part 1, subpart A, appendix A).

§ 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State (including the Commonwealth of Puerto Rico). The same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local

governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include —

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the

planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

* * *

§ 219.10 Forest planning — general procedure.

(a) *Responsibilities* — (1) *Regional Forester.* The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) *Forest Supervisor.* The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

(3) *Interdisciplinary team.* The team, under the direction of the Forest Supervisor, implements the public participation and coordination activities required by § 219.6 and § 219.7. The team shall continue to function even though membership may change and shall monitor and evaluate planning results and recommend revisions and amendments. The interdisciplinary team shall develop a forest plan and environmental impact

statement using the process established in § 219.12 and paragraph (b) below.

(b) *Public review of plain and environmental impact statement.* A draft and final environmental impact statement shall be prepared for the proposed plan according to NEPA procedures. The draft environmental impact statement shall identify a preferred alternative. To comply with 16 U.S.C. 1604(d), the draft environmental impact statement and proposed plan shall be available for public comment for at least 3 months, at convenient locations in the vicinity of the lands covered by the plan, beginning on the date of the publication of the notice of availability in the Federal Register. During this period, and in accordance with the provisions in § 219.6, the Forest Supervisor shall publicize and hold public participation activities as deemed necessary to obtain adequate public input.

(c) *Plan approval.* The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

(1) *Approval.* The Regional Forester shall prepare a concise public record of decision which documents approval and accompanies the plan and final environmental impact statement. The record of decision shall be prepared according to NEPA procedures (40 CFR 1505.2). The approved plan shall not become effective until at least 30 days after publication of the notice of availability of the final environmental impact statement in the Federal Register, to comply with 16 U.S.C. 1604(d) and 1604(j).

(2) *Disapproval.* The Regional Forester shall return the plan and final environmental impact statement to the Forest

Supervisor with a written statement of the reasons for disapproval. The Regional Forester may also specify a course of action to be undertaken by the Forest Supervisor in order to remedy deficiencies, error, or omissions in the plan or environmental impact statement.

(d) *Public appeal of approval decision.* The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

(e) *Plan implementation.* As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan. Subsequent administrative activities affecting such lands, including budget proposals, shall be based on the plan. The Forest Supervisor may change proposed implementation schedules to reflect differences between proposed annual budgets and appropriated funds. Such scheduled changes shall be considered an amendment to the forest plan, but shall not be considered a significant amendment, or require the preparation of an environmental impact statement, unless the changes significantly alter the long-term relationship between levels of multiple-use goods and services projected under planned budget proposals as compared to those projected under actual appropriations.

(f) *Amendment.* The Forest Supervisor may amend the

forest plan. Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant change in the plan. If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) *Revision.* A forest plan shall ordinarily be revised on a 10-year cycle or at least every 15 years. It also may be revised whenever the Forest Supervisor determines that conditions or demands in the area covered by the plan have changed significantly or when changes in RPA policies, goals, or objectives would have a significant effect on forest level programs. In the monitoring and evaluation process, the interdisciplinary team may recommend a revision of the forest plan at any time. Revisions are not effective until considered and approved in accordance with the requirements for the development and approval of a forest plan. The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have change significantly.

(h) *Planning records.* The Forest Supervisor and interdisciplinary team shall develop and maintain planning records that document the decisions and activities that result from the process of developing a forest plan. Records that support analytical conclusions made and alternatives considered by the team and approved by the Forest Supervisor throughout

the planning process shall be maintained. Such supporting records provide the basis for the development of the forest plan and associated documents required by NEPA procedures.

§ 219.11 Forest plan content.

The forest plan shall contain the following:

(a) A brief summary of the analysis of the management situation, including demand and supply conditions for resource commodities and services, production potentials, and use and development opportunities;

(b) Forest multiple-use goals and objectives that include a description of the desired future condition of the forest or grassland and an identification of the quantities of goods and services that are expected to be produced or provided during the RPA planning periods;

(c) Multiple-use prescriptions and associated standards and guidelines for each management area including proposed and probable management practices such as the planned timber sale program; and

(d) Monitoring and evaluation requirements that will provide a basis for a periodic determination and evaluation of the effects of management practices.

§ 219.12 Forest planning — process.

(a) *General requirements.* The preparation, revision, or significant amendment of a forest plan shall comply with the requirements established in this section. The planning process

includes at least those actions set forth in paragraphs (b) through (k) of the section. Some actions may occur simultaneously, and it may be necessary to repeat an action as additional information becomes available. The environmental impact statement for each forest plan shall be prepared according to NEPA procedures. To the extent feasible, a single process shall be used to meet planning and NEPA requirements.

(b) *Identification of purpose and need.* The interdisciplinary team shall identify and evaluate public issues, management concerns, and resource use and development opportunities, including those identified throughout the planning process during public participation activities and coordination with other Federal agencies, State and local governments, and Indian tribes. The Forest Supervisor shall determine the major public issues, management concerns, and resource use and development opportunities to be addressed in the planning process.

(c) *Planning criteria.* Criteria shall be prepared to guide the planning process. Criteria apply to collection and use of inventory data and information, analysis of the management situation, and the design, formulation, and evaluation of alternatives. Criteria designed to achieve the objective of maximizing net public benefits shall be included. Specific criteria may be derived from —

(1) Laws, Executive Orders, regulations, and agency policy as set forth in the Forest Service Manual;

(2) Goals and objectives in the RPA Program and regional guides;

(3) Recommendations and assumptions developed from public issues, management concerns, and resource use and development opportunities;

(4) The plans and programs of other Federal agencies, State and local governments, and Indian tribes;

(5) Ecological, technical, and economic factors; and

(6) The resource integration and management requirements in §§ 219.13 through 219.27.

(d) *Inventory data and information collection.* Each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction. The Supervisor will assure that the interdisciplinary team has access to the best available data. This may require that special inventories or studies be prepared. The interdisciplinary team shall collect, assemble, and use data, maps, graphic material, and explanatory aids, of a kind, character, and quality, and to the detail appropriate for the management decisions to be made. Data and information needs may vary as planning problems develop from identification of public issues, management concerns, and resource use and development opportunities. Data shall be stored for ready retrieval and comparison and periodically shall be evaluated for accuracy and effectiveness. The interdisciplinary team will use common data definitions and standards established by the Chief of the Forest Service to assure uniformity of information between all planning levels. As information is recorded, it shall be applied in any subsequent planning process. Information developed according to common data definitions and standards shall be used in the preparation of the 1990, and subsequent RPA Assessments and RPA Programs.

(e) *Analysis of the management situation.* The analysis of the management situation is a determination of the ability of the planning area covered by the forest plan to supply goods and services in response to society's demands. The primary purpose of this analysis is to provide a basis for formulating a broad range of reasonable alternatives. The analysis may examine the capability of the unit to supply outputs both with and without legal and other requirements. As a minimum, the analysis of the management situation shall include the following:

(1) Benchmark analyses to define the range within which alternatives can be constructed. Budgets shall not be a constraint. The following benchmark analyses shall be consistent with the minimum applicable management requirements of § 219.27 and shall define at least —

(i) The minimum level of management which would be needed to maintain and protect the unit as part of the National Forest System together with associated costs and benefits;

(ii) The maximum physical and biological production potentials of significant individual goods and services together with associated costs and benefits;

(iii) Monetary benchmarks which estimate the maximum present net value of those resources having an established market value or an assigned value;

(A) For forest planning areas with major resource outputs that have an established market price, monetary benchmarks shall include an estimate of the mix of resource uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price;

(B) For all forest planning areas, monetary benchmarks shall include an estimate of the mix of resource uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price or are assigned a monetary value;

(C) For forest planning areas with a significant timber resource, estimates for paragraphs (e)(1)(iii) (A) and (B) of this section shall be developed both with and without meeting the requirements for compliance with a base sale schedule of timber harvest, all described in § 219.16(a)(1), and with and without scheduling the harvest of even-aged stands generally at or beyond culmination of mean annual increment of growth, as described in § 219.16(a)(2)(iii).

(D) Estimates for paragraphs (e)(1)(iii) (A) and (B) of this section shall be developed both with and without other constraints when needed to address major public issues, management concerns, or resource opportunities identified during the planning process.

(2) The current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues; this will be the same analysis as that required by § 219.12(f)(5).

(3) Projections of demand using best available techniques with both price and nonprice information. To the extent practical, demand will be assessed as price-quantity relationships.

(4) A determination of the potential to resolve public issues and management concerns.

(5) Based on consideration of data and findings developed in paragraphs (e)(1)–(4), a determination of the need to establish or change management direction.

(f) *Formulation of alternatives.* The interdisciplinary team shall formulate a broad range of reasonable alternatives according to NEPA procedures. The primary goal in formulating alternatives, besides complying with NEPA procedures is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements of §§ 219.13 through 219.27.

(1) Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest. Alternatives shall reflect a range of resource outputs and expenditure levels.

(2) Alternatives shall be formulated to facilitate analysis of opportunity costs and of resource use and environmental trade-offs among alternatives and between benchmarks and alternatives.

(3) Alternatives shall be formulated to facilitate evaluation of the effects on present net value, benefits, and costs of achieving various outputs and values that are not assigned monetary values, but that are provided at specified levels.

(4) Alternatives shall provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process.

(5) Reasonable alternatives which may require a change in existing law or policy to implement shall be formulated if necessary to address a major public issue, management concern, or resource opportunity identified during the planning process (40 CFR 1501.7, 1502.14(c).

(6) At least one alternative shall be developed which responds to and incorporates the RPA Program tentative resource objectives for each forest displayed in the regional guide.

(7) At least one alternative shall reflect the current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues. Pursuant to NEPA procedures, this alternative shall be deemed the "no action" alternative.

(8) Each alternative shall represent to the extent practicable the most cost efficient combination of management prescriptions examined that can meet the objectives established in the alternative.

(9) Each alternative shall state at least —

(i) The condition and uses that will result from long-term application of the alternative;

(ii) The goods and services to be produced, the timing and flow of these resource outputs together with associated costs and benefits;

(iii) Resource management standards and guidelines; and

(iv) The purposes of the management direction proposed.

(g) *Estimated effects of alternatives.* The physical, biological, economic, and social effects of implementing each alternative considered in detail shall be estimated and compared according to NEPA procedures. These effects include those described in NEPA procedures (40 CFR 1502.14 and 1502.16) and at least the following:

(1) The expected outputs for the planning periods, including appropriate marketable goods and services, as well as nonmarket items, such as recreation and wilderness use, wildlife and fish, protection and enhancement of soil, water, and air, and preservation of aesthetic and cultural resource values;

(2) The relationship of expected outputs to the RPA Program tentative resource objectives for the forest displayed in the current regional guide;

(3) Direct and indirect benefits and costs, analyzed in sufficient detail to estimate —

(i) the expected real-dollar costs (discounted when appropriate), including investment, administrative, and operating costs of the agency and all other public and private costs required to manage the forest up to the point where the outputs are valued and the environmental consequences are realized;

(ii) the expected real-dollar value (discounted when appropriate) of all outputs attributable to each alternative to the extent that monetary values can be assigned to nonmarket goods and services, using quantitative and qualitative criteria when monetary values may not reasonably be assigned;

(iii) the economic effects of alternatives, including impacts on present net value, total receipts to the Federal Government, direct benefits to users that are not measured in receipts to the Federal Government, receipt shares to State and local governments, income, and employment in affected areas; and

(iv) the monetary opportunity costs (changes in present net value) associated with those management standards and resource outputs in each alternative that were not assigned monetary values but were provided at specified levels, compared with the maximum present net value benchmarks developed in § 219.12(e)(1)(iii).

(4) The significant resource tradeoffs and opportunity costs associated with achieving alternative resource objectives.

(h) *Evaluation of alternatives:* Using planning criteria, the interdisciplinary team shall evaluate the significant physical, biological, economic, and social effects of each management alternative that is considered in detail. The evaluation shall include a comparative analysis of the aggregate effects of the management alternatives and shall compare present net value, social and economic impacts, outputs of goods and services, and overall protection and enhancement of environmental resources.

(i) *Preferred alternative recommendation.* The Forest Supervisor shall review the interdisciplinary team's evaluation and shall recommend to the Regional Forester a preferred alternative to be identified in the draft environmental impact statement and displayed as the proposed plan.

(j) *Plan approval.* The Regional Forester shall review the

proposed plan and final environmental impact statement and either approve or disapprove the plan in accordance with § 219.10(c). The record of decision for approval of a plan shall include, in addition to the requirements of NEPA procedures (40 CFR 1505.2), a summarized comparison of the selected alternative with:

(1) Any other alternative considered which is environmentally preferable to the selected alternative; and

(2) Any other alternative considered which comes nearer to maximizing present net value.

(k) *Monitoring and evaluation.* At intervals established in the plan, implementation shall be evaluated on a sample basis to determine how well objectives have been met and how closely management standards and guidelines have been applied. Based upon this evaluation, the interdisciplinary team shall recommend to the Forest Supervisor such changes in management direction, revisions, or amendments to the forest plan as are deemed necessary. Monitoring requirements identified in the forest plan shall provide for —

(1) A quantitative estimate of performance comparing outputs and services with those projected by the forest plan;

(2) Documentation of the measured prescriptions and effects, including significant changes in productivity of the land; and

(3) Documentation of costs associated with carrying out the planned management prescriptions as compared with costs estimated in the forest plan.

(4) A description of the following monitoring activities:

(i) The actions, effects, or resources to be measured, and the frequency of measurements;

(ii) Expected precision and reliability of the monitoring process; and

(iii) The time when evaluation will be reported.

(5) A determination of compliance with the following standards:

(i) Lands are adequately restocked as specified in the forest plan;

(ii) Lands identified as not suited for timber production are examined at least every 10 years to determine if they have become suited; and that, if determined suited, such lands are returned to timber production;

(iii) Maximum size limits for harvest areas are evaluated to determine whether such size limits should be continued; and

(iv) Destructive insects and disease organisms do not increase to potentially damaging levels following management activities.

* * *

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§ 219.14 Timber resource land suitability.

During the forest planning process, lands which are not suited for timber production shall be identified in accordance with the criteria in paragraphs (a) through (d) of this section.

(a) During the analysis of the management situation, data on all National Forest System lands within the planning area shall be reviewed, and those lands within any one of the categories described in paragraphs (a) (1) through (4) of this section shall be identified as not suited for timber production —

(1) The land is not forest land an defined in § 219.3.

(2) Technology is not available to ensure timber production from the land without irreversible resource damage to soils productivity, or watershed conditions.

(3) There is not reasonable assurance that such lands can be adequately restocked as provided in § 219.27(c)(3).

(4) The land has been withdrawn from timber production by an Act of Congress, the Secretary of Agriculture or the Chief of the Forest Service.

(b) Forest lands other than those that have been identified as not suited for timber production in paragraph (a) of this section shall be further reviewed and assessed prior to formulation of alternatives to determine the costs and benefits for a range of management intensities for timber production. For the purpose of analysis, the planning area shall be stratified into categories of land with similar management costs and

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returns. The stratification should consider appropriate factors that influence the costs and returns such as physical and biological conditions of the site and transportation requirements. This analysis shall identify the management intensity for timber production for each category of land which results in the largest excess of discounted benefits less discounted costs and shall compare the direct costs of growing and harvesting trees, including capital expenditures required for timber production, to the anticipated receipts to the government, in accordance with § 219.12 and paragraphs (b)(1) through (b)(3) of this section.

(1) Direct benefits are expressed as expected gross receipts to the government. Such receipts shall be based upon expected stumpage prices and payments-in-kind from timber harvest considering future supply and demand situation for timber and upon timber production goals of the regional guide.

(2) Direct costs include the anticipated investments, maintenance, operating, management, and planning costs attributable to timber production activities, including mitigation measures necessitated by the impacts of timber production.

(3) In addition to long-term yield, the financial analysis must consider costs and returns of managing the existing timber inventory.

(c) During formulation and evaluation of each alternative as required in § 1219.12 (f) and (g), combinations of resource management objectives for the various multiple uses including outdoor recreation, timber, watershed, range wildlife and fish, and wilderness. The formulation and evaluation of each alternative shall consider the costs and benefits of alternative management intensities for timber production as identified

pursuant to paragraph (b) of this section in accordance with § 219.12(f). Lands shall be tentatively identified as not appropriate for timber production to meet objectives of the alternative being considered if —

(1) Based upon a consideration of multiple-use objectives for the alternative, the land is proposed for resource uses that preclude timber production, such as wilderness;

(2) Other management objectives for the alternative limit timber production activities to the point where management requirements set forth in § 219.27 cannot be met; or

(3) The lands are not cost-efficient, over the planning horizon, in meeting forest objectives, which include timber production.

(d) Lands identified as not suited for timber production in paragraph (a) of this section and lands tentatively identified as not appropriate for timber production in paragraph (c) of this section shall be designated as not suited for timber production in the preferred alternative. Designation in the plan of lands not suited for timber production shall be reviewed at least every 10 years. Such lands may be reviewed and redesignated as suited for timber production due to changed conditions at any time, according to the criteria in paragraphs (a) and (c) of this section, and according to the procedures for amendment or revision of the forest plan in § 219.10 (f) and (g).

§ 219.15 Vegetation management practices.

When vegetation is altered by management, the methods, timing, and intensity of the practices determine the level of

benefits that can be obtained from the affected resources. The vegetation management practices chosen for each vegetation type and circumstance shall be defined in the forest plan with applicable standards and guidelines and the reasons for the choices. Where more than one vegetation management practice will be used in a vegetation type, the conditions under which each will be used shall be based upon thorough reviews of technical and scientific literature and practical experience, with appropriate evaluation of this knowledge for relevance to the specific vegetation and site conditions. On National Forest System land, the vegetation management practice chosen shall comply with the management requirements in § 219.27(b).

§ 219.16 Timber resource sale schedule.

In a forest plan, the selected forest management alternative includes a sale schedule which provides the allowable sale quantity. The sale schedule of each alternative, including those which depart from base sale schedules, shall be formulated in compliance with 1219.12(f) and paragraphs (a) and (b) of this section.

(a) Alternatives shall be formulated that include determinations of the quantity of the timber that may be sold during each decade. These quantity determinations shall be based on the principle of sustained yield and shall meet the management requirements in § 219.27. For each alternative, the determination shall include a calculation of the long-term sustained-yield capacity and the base sale schedule and, when appropriate, a calculation of timber sale alternatives that may depart from the base sale schedule as provided in paragraphs (a)(1) through (a)(3) of this section.

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(1) For the base sale schedules, the planned sale for any future decade shall be equal to, or greater than, the planned sale for the preceding decade, provided that the planned sale is not greater than the long-term sustained-yield capacity consistent with the management objectives of the alternative.

(2) The determinations of the appropriate long-term sustained-yield capacities, base sale schedules, and departure alternatives to the base sale schedules shall be made on the basis of the guidelines which follow:

(i) For the long-term sustained-yield capacities and the base sale schedules, assume intensities of management and degree of timber utilization consistent with the goals, assumptions, and requirements contained in, or used in, the preparation of the current RPA Program and regional guide. For the base sale schedule, the management and utilization assumptions shall reflect the projected changes in practices for the four decades contained in, or used in, the preparation of the current RPA Program and regional guide. Beyond the fourth decade, the assumptions shall reflect those projected for the fourth decade of the current RPA Program, unless there is a basis for a different assumption;

(ii) For alternatives with sale schedules which depart from the corresponding base sale schedule, assume an appropriate management intensity;

(iii) In accordance with the established standards, assure that all even-aged stands scheduled to be harvested during the planning period will generally have reached the culmination of mean annual increment shall be based on expected growth, according to management intensities and utilization standards

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assumed in paragraphs (a)(2) (i) and (ii) of this section and on forest type and site quality. Mean annual increment shall be expressed in cubic measure. Alternatives which incorporate exceptions to these standards shall be evaluated if it is reasonable to expect that overall multiple use objectives would be better attained. Alternatives which incorporate exceptions to these standards are permitted for the use of sound silvicultural practices, such as thinning or other stand improvement measures; for salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack; for cutting for experimental and research purposes; or for removing particular species of trees, after consideration has been given to the multiple uses of the area being planned and after completion of the public participation process applicable to the preparation of a forest plan; and

(iv) Each sale schedule shall provide for a forest structure that will enable perpetual timber harvest which meets the principle of sustained-yield and multiple-use objectives of the alternative.

(3) Alternatives with sale schedules which depart from the principles of paragraph (a)(1) of this section and which will lead to better attaining the overall objectives of multiple-use management shall be evaluated when any of the following conditions are indicated:

(i) None of the other alternatives considered provides a sale schedule that achieves the assigned goals of the RPA Program as provided in § 219.4(b);

(ii) High mortality losses from any cause can be

significantly reduced or prevented or forest age-class distribution can be improved, thereby facilitating future sustained-yield management; or

(iii) Implementation of the corresponding base sale schedule would cause a substantial adverse impact upon a community in the economic area in which the forest is located.

(iv) It is reasonable to expect that overall multiple-use objectives would otherwise be better attained.

(b) The sale schedule of the management alternative selected in accordance with § 219.12 provides the allowable sale quantity for the first plan period.

§ 219.17 Evaluation of roadless areas.

(a) Unless otherwise provided by law, roadless areas within the National Forest System shall be evaluated and considered for recommendation as potential wilderness areas during the forest planning process, as provided in paragraphs (a) (1) and (2) of this section.

(1) During analysis of the management situation, the following areas shall be subject to evaluation:

(i) Roadless areas including those previously inventoried in the second roadless area review and evaluation (RARE II), in a unit plan, or in a forest plan, which remain essentially roadless and undeveloped, and which have not yet been designated as wilderness or for nowilderness uses by law. In addition, other essentially roadless areas may be subject to evaluation at the discretion of the Forest Supervisor.

(ii) Areas contiguous to existing wilderness, primitive areas, or administratively proposed wildernesses, regardless of which agency has jurisdiction for the wilderness or proposed wilderness;

(iii) Areas that are contiguous to roadless and undeveloped areas in other Federal ownership that have identified wilderness potential; and

(iv) Areas designated by Congress for wilderness study, administrative proposals pending before Congress, and other legislative proposals pending which have been endorsed by the President.

(2) For each area subject to evaluation under paragraph (a)(1) of this section, the determination of the significant resource issues, which in turn affect the detail and scope of evaluation required by the Forest Service, shall be developed with public participation. As a minimum, the evaluation shall include consideration of:

(i) The values of the area as wilderness;

(ii) The values foregone and effects on management of adjacent lands as a consequence of wilderness designation;

(iii) Feasibility of management as wilderness, in respect to size, non-conforming use, land ownership patterns, and existing contractual agreements or statutory rights;

(iv) Proximity to other designated wilderness and relative contribution to the National Wilderness Preservation System; and

(v) The anticipated long-term changes in plant and animal species diversity, including the diversity of natural plant and animal communities of the forest planning area and the effects of such changes on the values for which wilderness areas were created.

* * *

§ 219.18 Wilderness management.

Forest planning shall provide direction for the management of designated wilderness and primitive areas in accordance with the provisions of 36 CFR part 293. In particular, plans shall —

(a) Provide for limiting and distributing visitor use of specific areas in accord with periodic estimates of the maximum levels of use that allow natural processes to operate freely and that do not impair the values for which wilderness areas were created; and

(b) Evaluate the extent to which wildfire, insect, and disease control measures may be desirable for protection of either the wilderness or adjacent areas and provide for such measures when appropriate.

§ 219.19 Fish and wildlife resource.

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.

In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

(a) Each alternative shall establish objectives for the maintenance and improvement of habitat for management indicator species selected under paragraph (g)(1) of this section, to the degree consistent with overall multiple use objectives of the alternative. To meet this goal, management planning for the fish and wildlife resource shall meet the requirements set forth in paragraphs (a)(1) through (a)(7) of this section.

(1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reasons for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities. In the selection of management indicator species, the following categories shall be represented where appropriate: Endangered and threatened plant and animal species identified on State and Federal lists for the planning area; species with special habitat needs that may be influenced significantly by planned management programs; species commonly hunted, fished, or trapped; non-game species of special interest; and additional plant or animal species selected because their population changes are believed to indicate the effects of management activities on other species of selected major biological communities or on water quality. On the basis of available scientific information, the interdisciplinary team shall estimate the effects of changes in vegetation type, timber

age classes, community composition, rotation age, and year-long suitability of habitat related to mobility of management indicator species. Where appropriate, measures to mitigate adverse effects shall be prescribed.

(2) Planning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species.

(3) Biologists from State fish and wildlife agencies and other Federal agencies shall be consulted in order to coordinate planning for fish and wildlife, including opportunities for the reintroduction of extirpated species.

(4) Access and dispersal problems of hunting, fishing, and other visitor uses shall be considered.

(5) The effects of pest and fire management on fish and wildlife populations shall be considered.

(6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined. This monitoring will be done in cooperation with State fish and wildlife agencies, to the extent practicable.

(7) Habitat determined to be critical for threatened and endangered species shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined for threatened and endangered species that shall provide for, where possible, their removal from listing as threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

§ 219.20 Grazing resource.

In forest planning, the suitability and potential capability of National Forest System lands for producing forage for grazing animals and for providing habitat for management indicator species shall be determined as provided in paragraphs (a) and (b) of this section. Lands so identified shall be managed in accordance with direction established in forest plans.

(a) Lands suitable for grazing and browsing shall be identified and their condition and trend shall be determined. The present and potential supply of forage for livestock, wild and free-roaming horses and burros, and the capability of these lands to produce suitable food and cover for selected wildlife species shall be estimated. The use of forage by grazing and browsing animals will be estimated. Lands in less than satisfactory condition shall be identified and appropriate action planned for their restoration.

(b) Alternative range management prescriptions shall consider grazing systems and the facilities necessary to implement them; land treatment and vegetation manipulation practices; and evaluation of pest problems; possible conflict or beneficial interactions among livestock, wild free-roaming horses and burros and wild animal populations, and methods of regulating these; direction for rehabilitation of ranges in unsatisfactory condition; and comparative cost efficiency of the prescriptions.

* * *

§ 219.24 Cultural and historic resources.

Forest planning shall provide for the identification, protection, interpretation, and management of significant cultural resources on National Forest System lands. Planning of the resource shall be governed by the requirements of Federal laws pertaining to historic preservation, and guided by paragraphs (a)(1) through (a)(3) of this section.

(a) Forest planning shall —

(1) Provide an overview of known data relevant to history, ethnography, and prehistory of the area under consideration, including known cultural resource sites;

(2) Identify areas requiring more intensive inventory;

(3) Provide for evaluation and identification of appropriate sites for the National Register of Historic Places;

(4) Provide for establishing measures for the protection of significant cultural resources from vandalism and other human depredation, and natural destruction;

(5) Identify the need for maintenance of historic sites on, or eligible for inclusion in, the National Register of Historic Places; and

(6) Identify opportunities for interpretation of cultural resources for the education and enjoyment of the American public.

(b) In the formulation and analysis of alternatives,

interactions among cultural resources and other multiple uses shall be examined. This examination shall consider impacts of the management of cultural resources on other uses and activities and impacts of other uses and activities on cultural resource management.

(c) Formulation and evaluation of alternatives shall be coordinated to the extent feasible with the State cultural resource plan and planning activities of the State Historic Preservation Office and State Archaeologist and with other State and Federal agencies.

§ 219.25 Research natural areas.

Forest planning shall provide for the establishment of Research Natural Areas (RNA's). Planning shall make provision for the identification of examples of important forest, shrubland, grassland, alpine, aquatic, and geologic types that have special or unique characteristics of scientific interest and importance and that are needed to complete the national network of RNA's. Biotic, aquatic, and geologic types needed for the network shall be identified using a list provided by the Chief of the Forest Service. Authority to establish RNA's is delegated to the Chief at 7 CFR 2.60(a) and 36 CFR 251.23. Recommendations for establishment of areas shall be made to the Chief through the planning process.

§ 219.27 Management requirements.

The minimum specific management requirements to be met in accomplishing goals and objectives for the National Forest System are set forth in this section. These requirements guide the development, analysis, approval, implementation, monitoring and evaluation of forest plans.

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(a) *Resource protection.* All management prescriptions shall —

(1) Conserve soil and water resources and not allow significant or preeminent impairment of the productivity of the land;

(2) Consistent with the relative resource values involved, minimize serious or long-lasting hazards from flood, wind, wildfire, erosion, or other natural physical forces unless these are specifically excepted, as in wilderness;

(3) Consistent with the relative resource values involved, prevent or reduce serious, long lasting hazards and damage from pest organisms, utilizing principles of integrated pest management. Under this approach all aspects of a pest-host system should be weighed to determine situation-specific prescriptions which may utilize a combination of techniques including, as appropriate, natural controls, harvesting, use of resistant species, maintenance of diversity, removal of damaged trees, and judicious use of pesticides. The basic principle in the choice of strategy is that, in the long term, it be ecologically acceptable and compatible with the forest ecosystem and the multiple use objectives of the plan;

(4) Protect streams, streambanks, shorelines, lakes, wetlands, and other bodies of water as provided under paragraphs (d) and (e) of this section;

(5) Provide for and maintain diversity of plant and animal communities to meet overall multiple-use objectives, as provided in paragraph (g) of this section;

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(6) Provide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species chosen under §219.19 is maintained and improved to the degree consistent with multiple-use objectives established in the plan;

(7) Be assessed prior to project implementation for potential physical, biological, aesthetic, cultural, engineering, and economic impacts and for consistency with multiple uses planned for the general area;

(8) Include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species;

(9) Provide that existing significant transportation and utility corridors and other significant right-of-ways that are capable and likely to be needed to accommodate the facility or use from an additional compatible right-of-way be designated as a right-of-way corridor. Subsequent right-of-way grants will, to the extent practicable, and as determined by the responsible line officer, use designated corridors;

(10) Ensure that any roads constructed through contracts, permits, or leases are designed according to standards appropriate to the planned uses, considering safety, cost of transportation, and effects upon lands and resources;

(11) Provide that all roads are planned and designed to re-establish vegetative cover on the disturbed area within a reasonable period of time, not to exceed 10 years after the termination of a contract, lease or permit, unless the road is determined necessary as a permanent addition to the National Forest Transportation System; and

(12) Be consistent with maintaining air quality at a level that is adequate for the protection and use of National Forest System resources and that meets or exceeds applicable Federal, State and/or local standards or regulations.

(b) *Vegetative manipulation.* Management prescriptions that involve vegetative manipulation of tree cover for any purpose shall —

(1) Be best suited to the multiple-use goals established for the area with potential environmental, biological, cultural resource, aesthetic, engineering, and economic impacts, as stated in the regional guides and forest plans, being considered in this determination;

(2) Assure that lands can be adequately restocked as provided in paragraph (c)(3) of this section, except where permanent openings are created for wildlife habitat improvement, vistas, recreation uses and similar practices;

(3) Not be chosen primarily because they will give the greatest dollar return or the greatest output of timber, although these factors shall be considered;

(4) Be chosen after considering potential effects on residual trees and adjacent stands;

(5) Avoid permanent impairment of site productivity and ensure conservation of soil and water resources;

(6) Provide the desired effects on water quantity and quality, wildlife and fish habitat, regeneration of desired tree species, forage production, recreation uses, aesthetic values, and other resource yields; and

(7) Be practical in terms of transportation and harvesting requirements, and total costs of preparation, logging, and administration.

(c) *Silvicultural practices.* The following management requirements apply to timber harvest and cultural treatments;

(1) No timber harvesting shall occur on lands classified as not suited for timber production pursuant to §219.14 except for salvage sales, sales necessary to protect other multiple-use values or activities that meet other objectives on such lands if the forest plan establishes that such actions are appropriate. These lands shall continue to be treated for reforestation purposes if necessary to achieve the multiple-use objective of the plan.

(2) The selected sale schedule provides the allowable sale quantity for the first planning period. Within the planning period, the volume of timber to be sold in any one year may exceed the average annual allowable sale quantity so long as the total amount sold for the planning period does not exceed the allowable sale quantity. Nothing in this paragraph prohibits salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger of insect or disease attack and where such harvests are consistent with silvicultural and environmental standards. Such timber may either substitute for timber that would otherwise be sold under the plan or, if not feasible, be sold over and above the planned volume.

(3) When trees are cut to achieve timber production objectives, the cuttings shall be made in such a way as to assure that the technology and knowledge exists to adequately restock the lands within 5 years after final harvest. Research and

experience shall be the basis for determining whether the harvest and regeneration practices planned can be expected to result in adequate restocking. Adequate restocking means that the cut area will contain the minimum number, size, distribution, and species composition of regeneration as specified in regional silvicultural guides for each forest type. Five years after final harvest means 5 years after clearcutting, 5 years after final overstory removal in shelterwood cutting, 5 years after the seed tree removal cut in seed tree cutting, or 5 years after selection cutting.

(4) Cultural treatments such as thinning, weeding, and other partial cutting may be included in the forest plan where they are intended to increase the rate of growth of remaining trees, favor commercially valuable tree species, favor species or age classes which are most valuable for wildlife, or achieve other multiple-use objectives.

(5) Harvest levels based on intensified management practices shall be decreased no later than the end of each planning period if such practices cannot be completed substantially as planned.

(6) Timber harvest cuts designed to regenerate an even-aged stand of timber shall be carried out in a manner consistent with the protection of soil, watershed, fish and wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource.

(7) Timber harvest and other silvicultural treatments shall be used to prevent potentially damaging population increases of forest pest organisms. Silvicultural treatments shall not be applied where such treatments would make stands susceptible

to pest-caused damage levels inconsistent with management objectives.

(d) *Even-aged management.* When openings are created in the forest by the application of even-aged silviculture, the following management requirements apply;

(1) Openings shall be located to achieve the desired combination of multiple-use objectives. The blocks or strips cut shall be shaped and blended with the natural terrain, to the extent practicable, to achieve aesthetic, wildlife habitat, or other objectives established in the plan. Regional guides shall provide guidance on dispersion of openings in relation to topography, climate, geography, local land use patterns, forest types or other factors. As a minimum, openings in forest stands are no longer considered openings once a new forest is established. Forest plans may set forth variations to this minimum based on site-specific requirements for achieving multiple-use objectives. Regional guides shall provide guidance for determining variations to this minimum in the forest plan, based on requirements for watershed, wildlife habitat, scenery or other resource protection needs, or other factors.

(2) Individual cut blocks, patches, or strips shall conform to the maximum size limits for areas to be cut in one harvest operation established by the regional guide according to geographic areas and forest types. This limit may be less than, but will not exceed, 60 acres for the Douglas-fir forest type of California, Oregon, and Washington; 80 acres for the southern yellow pine types of Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Oklahoma, and Texas; 100 acres for the hemlock-sitka spruce forest type of coastal Alaska; and 40 acres for all other forest

types except as provided in paragraphs (d)(2)(i) through (iii) of this section:

(i) Cut openings larger than those specified may be permitted where larger units will produce a more desirable combination of net public benefits. Such exceptions shall be provided for in regional guides. The following factors shall be considered in evaluating harvest cuts of various sizes and shapes to determine size limits by geographic areas and forest types; Topography; relationship of units to other natural or artificial openings and proximity of units; coordination and consistency with adjacent forests and regions; effect on water quality and quantity; visual absortion capability; effect on wildlife and fish habitat; regeneration requirements for desirable tree species based upon the latest research findings; transportation and harvesting system requirements; environmental and forest pest hazards to regeneration, residual trees, and surrounding stands; and the relative total costs of preparation and administration, transportation requirements, harvesting, site preparation, planting stocking control, and future stand tending of harvest cuts of various sizes and shapes. Specification for exceptions shall include the particular conditions under which the larger size is permitted and shall set a new maximum size permitted under those conditions.

(ii) Size limits exceeding those established in paragraphs (d)(2) and (d)(2)(i) of this section are permitted on an individual timber sale basis after 60 days' public notice and review by the Regional Forester.

(iii) The established limit shall not apply to the size of areas harvested as a result of natural catastrophic condition such as fire, insect and disease attack, or windstorm.

(e) *Riparian areas.* Special attention shall be given to land and vegetation for approximately 100 feet from the edges of all perennial streams, lakes, and other bodies of water. This area shall correspond to at least the recognizable area dominated by the riparian vegetation. No management practices causing detrimental changes in water temperature or chemical composition, blockages of water courses, or deposits of sediment shall be permitted within these areas which seriously and adversely affect water conditions or fish habitat. Topography, vegetation type, soil, climatic conditions, management objectives, and other factors shall be considered in determining what management practices may be performed within these areas or the constraints to be placed upon their performance.

(f) *Soil and water.* Conservation of soil and water resources involved the analysis, protection, enhancement, treatment, and evaluation of soil and water resources and their responses under management and shall be guided by instructions in official technical handbooks. These handbooks must show specific ways to avoid or mitigate damage, and maintain or enhance productivity on specific sites. These handbooks may be regional in scope or, where feasible, specific to physiographic or climatic provinces.

(g) *Diversity.* Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from that which would be expected in a natural forest, or from that similar to the existing

diversity in the planning area, may be prescribed only where needed to meet overall multiple-use objectives. Planned type conversion shall be justified by an analysis showing biological, economic, social, and environmental design consequences, and the relation of such conversions to the process of natural change.